RECORD
AND
BRIEFS

No. 10-1491

IN THE
# Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,
*Petitioners*,

v.

ROYAL DUTCH PETROLEUM CO., ET AL.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## SUPPLEMENTAL BRIEF FOR RIO TINTO GROUP AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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## SUPPLEMENTAL BRIEF OF RIO TINTO GROUP AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of Rio Tinto Group in support of respondents.[1]

## INTEREST OF AMICUS CURIAE

Rio Tinto Group ("Rio Tinto") is a leading international mining group, combining Rio Tinto plc, a London listed public company headquartered in the United Kingdom, and Rio Tinto Limited, which is listed on the Australian Stock Exchange, with executive offices in Melbourne. Rio Tinto has been named as a defendant in several high-profile actions under the Alien Tort Statute ("ATS"). Most notably, a complaint was filed against Rio Tinto in the Central District of California in 2000, seeking to hold the company responsible for the destruction that took place during a civil war in Papua New Guinea. The Ninth Circuit, in its second en banc ruling in the case, held (among other things) that Rio Tinto can be held secondarily liable for the conduct of the Papua New Guinea military, on Papua New Guinea soil, concerning Papua New Guinea citizens. Rio Tinto has petitioned this Court for a writ of certiorari—docketed as No. 11-649—to review the Ninth Circuit's judgment. That petition, like this case, presents the question whether U.S. courts should recognize a federal common law action under the ATS

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[1] No counsel for any party has authored this brief in whole or in part, and no person other than amicus or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

arising from conduct occurring entirely within the jurisdiction of a foreign sovereign, especially where the claim addresses the foreign sovereign's own conduct on its own soil toward its own citizens. Rio Tinto thus has a direct and substantial interest in the resolution of that question.

## INTRODUCTION AND SUMMARY OF ARGUMENT

This case is one quintessentially ill-suited for the exercise of federal common lawmaking power under the ATS.

The ATS provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. In *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that while the ATS is itself merely a jurisdictional provision, the statute empowers federal courts, in very limited circumstances, to imply a federal common law action to enforce a small set of universally recognized and clearly defined norms of international human-rights law. *Id.* at 732.

This case presents a question that this Court noted but did not answer in *Sosa*: "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."

The question itself establishes a premise crucial to understanding its answer: any cause of action would be recognized—meaning, in functional terms, *created*—by this Court, rather than by Congress. As

*Sosa* explains, in enacting the ATS, Congress itself did not make any substantive policy determinations about the appropriate scope of U.S. law, but instead left that choice to federal courts exercising common law authority. And "where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created." *Sosa*, 542 U.S. at 725. The question here, then, is whether this Court, in the complete absence of any congressional guidance, should create U.S. substantive law allowing foreign plaintiffs to seek redress of injuries allegedly inflicted by a foreign sovereign, within that sovereign's own territory. That question all but answers itself.

As a general matter, federal statutes are presumed not to reach conduct occurring abroad, to avoid interfering with the prerogatives of foreign sovereigns without express congressional authorization. That presumption should apply *a fortiorari* in the context of federal common law, where the courts—which have no authority *at all* over the Nation's foreign relations—must be especially careful to avoid infringing the foreign-policy prerogatives of the political branches. The *Sosa* Court expressly warned courts to exercise "great caution" before creating new federal common law actions under the ATS. *Id.* at 728. That admonition applies with particular force to actions that would subject the conduct of foreign governments themselves to scrutiny by U.S. courts. Both the United States and its allies have repeatedly objected to such actions, including this one. Courts should not be in the business of

creating U.S. law that so directly infringes the foreign-policy interests of this Nation.

That is most certainly true where, as here, the action bears no connection of any kind to the United States. Petitioners want this Court to create a cause of action allowing Nigerian plaintiffs to sue a British and Dutch company for injuries sustained in Nigeria and inflicted by the Nigerian government. Petitioners' theory relies on the principle of "universal jurisdiction," pursuant to which one nation may, in appropriate circumstances, apply its own law to regulate and punish conduct occurring in other nations, even absent any connection to the first nation. But while universal jurisdiction is generally accepted, in theory, by the international community, there is a marked absence of any international consensus that universal jurisdiction can be invoked to govern secondary actors.

More generally, because universal jurisdiction by its nature directly interferes with the ability of foreign sovereigns to govern their own citizens, it is very rarely invoked by U.S. law, and only by Congress under strictly defined conditions. Congress has explicitly rejected application of universal criminal jurisdiction in some circumstances, and has allowed it only when subject to the check of robust prosecutorial discretion—i.e., review by executive branch officials attuned to the serious foreign-relations risks that universal jurisdiction entails. No such check would exist here, because petitioners seek judicial creation of universal *civil* jurisdiction. Foreign nations that have experimented with unchecked universal civil jurisdiction were quickly forced to abandon it because of the international fric-

tion it invited. And Congress has recognized a universal private cause of action only once, in the Torture Victim Protection Act ("TVPA"), and it imposed significant limitations (such as the lack of corporate liability and the need to exhaust local remedies) that reduce the risk of adverse foreign-policy consequences, and that would preclude actions like this one. If U.S. law is to regulate and punish wholly foreign conduct with no U.S. connections, it should be positive U.S. law enacted by Congress under express conditions prescribed by Congress. Foreign affairs are not, and should not become, judicial affairs.

## ARGUMENT

### I. THIS COURT SHOULD NOT CREATE A FEDERAL COMMON LAW CAUSE OF ACTION FOR CONDUCT OCCURRING ON FOREIGN SOIL, PARTICULARLY WHEN THE PRIMARY CONDUCT ALLEGED IS THAT OF A FOREIGN SOVEREIGN

#### A. Under *Sosa*, Courts Create The Substantive Federal Common Law Applicable In ATS Actions, And They Must Exercise "Great Caution" In Doing So

1. This Court in *Sosa* addressed the question whether to ratify the view then prevailing in the lower courts, beginning with the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), that the ATS allows alien plaintiffs to sue individuals for violations of modern international human-rights norms occurring abroad. The plaintiff in *Sosa* argued that the ATS itself creates a cause of action for violations of customary international law. In contrast, the United States argued that (i) the ATS

is a jurisdictional provision only, and does not create a cause of action; and (ii) customary international law norms do not themselves create a cause of action unless Congress expressly has enacted such norms into law and made them privately enforceable, as it did with TVPA. *See* Br. for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, No. 03-339 (U.S.).

The *Sosa* Court accepted neither the plaintiff's nor the government's approach. The Court held, consistent with the government's position, that "the ATS is a jurisdictional statute creating no new causes of action." 542 U.S. at 724. But the Court further held that "history and practice" demonstrate that the First Congress "intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations" that would have been seen as providing for personal liability under the general common law at the time: offenses against ambassadors, violations of safe conduct, and piracy. *Id.* at 714, 720. Thus, while the Court acknowledged that there was no longer any *general* common law after *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), it held that the ATS empowers federal courts to create under *federal* common law a cause of action to enforce "a very limited category" of law-of-nations norms. 542 U.S. at 712, 726, 729-30, 732.

The *Sosa* Court stressed the need for courts to exercise "great caution" before recognizing federal common law actions under the ATS. *Id.* at 728. Such caution is warranted, the Court explained, because "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law," and "[i]t would be remark-

able to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Id.* at 726. Further, the Court had "recently and repeatedly" stated that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases," because the "creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id.* at 727. And the Court stressed that it "ha[d] no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity." *Id.* at 728. Finally, the Court emphasized that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727.

In light of this need to engage in "vigilant doorkeeping" when considering recognition of claims asserted under the ATS, *id.* at 729, the Court noted several limitations on the scope of such claims. The only limit necessary to decide *Sosa* itself was "that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted"—

i.e., piracy, safe conducts, and offenses against ambassadors. *Id.* at 732. And the question whether to create a given federal common law cause of action under the ATS "should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts." *Id.* at 732-33. The Court held that the plaintiff's basic claim of arbitrary detention failed to satisfy the threshold standard of clear definition and universal acceptance, and thus the Court had no cause to go further. *Id.* at 738.

2. Petitioners erroneously contend that *Sosa* supports their position here because the international law violations alleged in that case, as in this one, occurred on foreign soil. Pet. Supp. Br. 12-18. As just noted, however, the *Sosa* Court had no cause to decide the extent of the ATS's extraterritorial reach, because it dismissed the complaint on another ground. 542 U.S. at 738; *see also* U.S. Supp. Amicus Br. 12-13.

Even more significant, this case involves not just conduct on foreign soil, but the conduct *of a foreign sovereign* on its own soil. The facts of *Sosa* presented no such problem—the defendants there were Mexican civilians who were allegedly hired by the U.S. DEA to abduct the plaintiff, and "who were not affiliated with either government." *Alvarez-Machain v. United States*, 331 F.3d 604, 609-11 (9th Cir. 2003). Yet the *Sosa* Court went out of its way to express serious doubts that a court could recognize a federal common law action, under the guise of the ATS, implicating the conduct of a foreign sovereign on its own soil directed at its own citizens. An action

"that would go so far as to claim a limit on the power of foreign governments over their own citizens," the Court warned, "would raise risks of adverse foreign policy consequences," and thus perhaps should not be recognized "at all." 542 U.S. at 727-28.

This Court should now close the door to such claims categorically, for the reasons explained below.

### B. Established Legal Principles Preclude Judicial Creation Of A Federal Common Law Action Challenging—Directly Or Indirectly—The Conduct Of A Foreign Sovereign On Its Own Soil

"[T]he ATS does not authorize federal courts to fashion federal common law—*i.e.*, law of the United States—to govern conduct arising in the jurisdiction of a foreign sovereign, especially where those claims involve a foreign government's treatment of its own citizens." U.S. Amicus Br. Supporting Reh'g at 3, *Sarei v. Rio Tinto, PLC*, No. 02-56256 (9th Cir. May 18, 2007) (emphasis omitted). Multiple considerations compel that conclusion.

1. The analysis begins with the "presumption against extraterritorial application of U.S. law absent express direction from Congress." *Id.*; *see, e.g.*, *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010). That presumption stretches back to the era of the ATS's enactment. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824); *Rose v. Himley*, 8 U.S. (4 Cranch) 241, 279 (1808). And it was applied in the early years specifically to Acts of Congress adopted to address violations of the law of nations, such as piracy. *E.g.*, *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630-31 (1818). If the govern-

mental branches with constitutional authority over foreign affairs must legislate against the backdrop of a presumption that their enactments do not extend into foreign jurisdictions, it follows that the judicial branch—with no authority whatsoever over foreign affairs—must overcome an even heavier burden before "project[ing] U.S. law into foreign countries through the fashioning of federal common law." U.S. Amicus Br. at 12, *Am. Isuzu Motors, Inc. v. Ntsebeza*, No. 07-919 (U.S.) ("U.S. *Ntsebeza* Br.").

2. The history of the ATS provides no warrant for courts to operate more freely than Congress itself in imposing U.S. law on foreign countries and foreign actors. Just the opposite. The ATS was enacted in response to international incidents caused by assaults by U.S. individuals on foreign ambassadors *within the United States*. *Sosa*, 542 U.S. at 716-17. The only two reported ATS decisions in the decades following the statute's enactment involved events on U.S. soil or in U.S. territorial waters. *See Moxon v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1793); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795). And a 1795 opinion by Attorney General Bradford—expressly relied upon in *Sosa*, 542 U.S. at 721—explained that U.S. courts possess jurisdiction over acts committed in violation of a treaty within the United States or, in the case of piracy, on the high seas, but that "[a]cts of the kind occurring in a foreign country ... are not within the cognizance of our courts." 1 Op. Att'y Gen. 57, 58 (1795).

3. The concerns underlying the presumption against extraterritorial application of U.S. law are at their zenith when the law would require U.S. courts to sit in judgment of foreign sovereigns themselves.

Such cases squarely implicate the core concern animating the presumption against extraterritoriality—avoiding "clashes" with foreign governments "which could result in international discord." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). *Sosa* explicitly cautioned against entertaining extraterritorial suits that "would go so far as to claim a limit on the power of foreign governments over their own citizens." 542 U.S. at 727.

The United States has repeatedly emphasized the foreign-policy dangers inherent in any claim requiring a U.S. court to pass judgment on the conduct of foreign sovereigns. Such claims, the government has warned, "pose[] serious risks to the United States' relations with foreign states and to the political Branches' ability to conduct the Nation's foreign policy." U.S. *Ntsebeza* Br. 18. This is true even where, as here, the claims are asserted against a private actor, since they seek to hold the private actor secondarily liable for the allegedly wrongful conduct of the sovereign itself. As the United States' supplemental filing in this case explains, secondary liability claims like aiding and abetting "necessarily entail a determination" that the sovereign has "transgressed limits imposed by international law," U.S. Supp. Amicus Br. 17, and thus implicate foreign-policy concerns similar to those raised by claims against the sovereign itself.

Secondary liability claims challenging the underlying acts of a foreign sovereign pose risks to the Nation's foreign affairs for obvious reasons. For one thing, they provide "a clear means for effectively circumventing" important restrictions on civil suits against foreign sovereigns, because they compel fed-

eral courts to adjudicate the legality of a foreign government's acts even though Congress has determined that the foreign government should be immune from suit. U.S. *Ntsebeza* Br. 15.

Such actions also interfere with the ability of Congress and the Executive Branch to use trade-related foreign policy tools—including encouraging or limiting trade—to foster the liberalization of undemocratic regimes. *Id.* at 20-21. The threat of ATS actions against corporations operating abroad creates "uncertainty for those operating in countries where abuses might occur," and thus has "a deterrent effect on the free flow of trade and investment." *Id.* at 20. By "hinder[ing] global investment in developing economies, where it is most needed," extraterritorial ATS litigation against corporations "inhibit[s] efforts by the international community to encourage positive changes in developing countries." *Id.* (quoting letter from United Kingdom, joined by Germany, to the U.S. State Department).

4. While *Congress* may decide that under certain circumstances, projecting U.S. law into foreign jurisdictions may promote rather than undermine U.S. foreign-policy interests, Congress has not yet made any such judgment as to secondary liability claims like those asserted here. Liability instead would result entirely "from decisions of the Judiciary, which lacks the expertise of the political Branches to weigh the relevant considerations," and it would be imposed through claims asserted solely "by private plaintiffs without 'the check imposed by prosecutorial discretion' that the Executive can exercise in the criminal context." U.S. Supp. Amicus Br. 17 (quoting *Sosa*, 542 U.S. at 727).

In short, extraterritorial claims—particularly those challenging the conduct of a foreign sovereign—implicate foreign-affairs matters that are beyond the capacity of courts to handle. Such claims thus should be excluded from the scope of the federal common law that courts may apply on their own under the ATS.

### C. Modern ATS Litigation Confirms That Extraterritorial Actions Implicating The Conduct Of Foreign Sovereigns On Their Own Soil Result In Significant Foreign-Relations Friction

As explained, *Sosa* made clear that the reach of the ATS should be limited in large part because allowing claims for conduct occurring abroad and involving foreign governments (as all of these claims do) is especially likely to interfere with the political branches' foreign-policy prerogatives. 542 U.S. at 727-28. The creation of a secondary liability action involving the underlying conduct of a foreign sovereign on its own soil exacerbates those adverse foreign-policy consequences immeasurably, as the modern history of ATS litigation demonstrates.

1. The ATS was enacted by the First Congress as part of the Judiciary Act of 1789. Despite its vintage, the ATS had very limited significance for nearly two centuries, providing jurisdiction in only one case before 1980. *See Sosa*, 542 U.S. at 712.

The Second Circuit's opinion in *Filartiga* initiated the first modern wave of ATS litigation, holding for the first time that an alien plaintiff may bring suit in U.S. courts alleging that individual foreign officials violated certain specific, concrete norms univer-

sally recognized under the law of nations (in that case torture by a lone state actor). 630 F.2d at 890. ATS litigation expanded after *Filartiga*, but the cases were still limited in number, scope, and consequence. They generally "involved claims by alien plaintiffs against alien individual defendants," who often failed to defend the suits and had default judgments entered against them. Julian Ku, *The Third Wave: The Alien Tort Statute And The War On Terrorism*, 19 Emory Int'l L. Rev. 105, 108 (2005). These actions did not appear to cause any serious international friction or elicit strong reactions from either the United States or foreign sovereigns. *Id.*

The second modern wave of ATS litigation was unleashed in 1995, when the Second Circuit held that some norms of international human-rights law actionable under the ATS—like genocide and war crimes—do not require state action. *Kadic v. Karădzíc*, 70 F.3d 232, 241-43 (2d Cir. 1995). Largely in response to *Kadic*, alien plaintiffs began to bring suit—often in the form of class actions—against private corporations operating in foreign nations.

ATS suits against corporations were significantly different in kind and consequence from the suits against individual state officials brought in *Filartiga*'s wake. Most international norms require state action, and even those that do not are nevertheless usually committed directly by state actors. Thus, in order to assert corporate liability under the ATS, plaintiffs were compelled to allege theories of secondary liability, where the primary acts were allegedly committed by the foreign government itself. *See, e.g., Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174

(C.D. Cal. 1998) (class of Burmese citizens sue U.S. and French corporation, alleging that corporations hired Burmese military, police, and security forces to provide security, and these Burmese officials committed human-rights violations against indigenous population); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542-43, 549 (S.D.N.Y. 2004) (suit against dozens of corporations that allegedly aided and abetted apartheid by doing business with South Africa's apartheid regime); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 26 (D.D.C. 2005) (suit alleging that ExxonMobil knowingly aided the Indonesian government and military in torturing and killing civilians); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 638-39 (S.D.N.Y. 2006) (purported class action on behalf of Sudanese residents, alleging that Canadian corporation aided Sudan in committing genocide, crimes against humanity, and war crimes).

Unlike the early post-*Filartiga* suits, the underlying conduct targeted by these suits against corporations was that of sovereign governments themselves, not individual rogue state actors. This created several sources of friction. First, the new corporate cases required courts to find that a foreign sovereign *itself* violated a universally recognized international law norm, such as torture, war crimes, or genocide. Second, because corporations are more attractive targets than individuals—particularly individuals with no U.S. assets—the volume of such suits increased dramatically through the late 1990s and into the new century. *See* Ku, *supra*, at 109. Finally, in many of these cases, the corporations being sued were targeted for doing business in a country with a

poor human-rights record—where Congress or the President had often made a policy determination to *favor* U.S. business investment in the country, as a means of promoting liberalization and political and social reform.

2. The nature and increased volume of these new actions sparked significant international tension. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("recent ATS cases based on acts that occurred in foreign nations have often engendered conflict with other sovereign nations" (emphasis omitted)). Numerous sovereigns—including close U.S. allies—objected to such extraterritorial suits as interfering with their sovereign rights to regulate their own territory and citizens. *Id.* (explaining, for example, that Indonesia had "strenuously and repeatedly objected" to the *Doe v. Exxon Mobil* lawsuit, and that the "Government of South Africa complained for six years that an extraterritorial ATS case litigated in the Second Circuit interfered with the operation of its post-apartheid Truth and Reconciliation Commission"). Objections were also heard from the sovereigns whose companies were being sued. *See* U.S. *Ntsebeza* Br. 20 (noting formal objections to Apartheid litigation filed with the State Department by United Kingdom, Germany, Switzerland, and other countries). The United States itself also routinely filed "Statements of Interest" or amicus briefs explaining that continued adjudication of these cases would risk serious foreign policy consequences. *See, e.g.*, *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 347 (D.C. Cir. 2007) (statement of interest); *S. African Apartheid Litig.*, 346 F. Supp. 2d at 553 (statement of interest); Br. for

United States as *Amicus Curiae*, *Khulumani v. Barclay Nat'l Bank*, No. 05-2141 (2d Cir. Oct. 14, 2005); Br. for United States as *Amicus Curiae*, *Sarei v. Rio Tinto PLC*, No. 02-56256 (9th Cir. May 18, 2007).

3. Objections to suits like this one continue. The United Kingdom and the Netherlands have repeatedly objected to U.S. courts' exercise of jurisdiction over this action, *see* Br. of United Kingdom and the Netherlands as *Amici Curiae* 5-33; Supp. Br. of United Kingdom and the Netherlands as *Amici Curiae* Br. 5-36, as has Germany, Br. of Germany as *Amicus Curiae* Br. 2. The United Kingdom and Australia have lodged similar objections to the *Rio Tinto* case. Br. of United Kingdom and Australia as *Amici Curiae* at 4-6, *Rio Tinto plc v. Sarei*, No. 11-649 (U.S.).

Most important, the United States has again reaffirmed that "the Court should not fashion a federal common-law cause of action" "[i]n the circumstances of this case." U.S. Supp. Amicus Br. 5. "A decision not to create a private right of action under U.S. law in these circumstances would give effect to the Court's admonition in *Sosa* to exercise particular caution in deciding whether, 'if at all,' to consider suits under rules that would 'claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.'" *Id.* (quoting 542 U.S. at 727-28).

### D. Federal Common Law Indirect Liability Claims Contravene The Purpose Of ATS Jurisdiction

The adverse foreign-policy consequences of indirect liability for conduct of a foreign sovereign should be enough in themselves to preclude a court in any context from judicially creating such a claim through federal common lawmaking power. But those consequences provide especially compelling reasons to reject such actions in the particular context of federal common law *under the ATS*, because such consequences would undermine the very purpose of that statute.

As *Sosa* explains, the ATS was enacted by the First Congress because of anxiety on the part of the Continental Congress that the courts of the states, during the period of the Articles of Confederation, were not sufficiently open to complaints of international law violations—and in particular, assaults against foreign ambassadors. Congress believed that a federal forum was needed to vindicate law-of-nations violations, in order to mitigate the international friction that stems from such incidents. 542 U.S. at 715-18.

Creating secondary-liability actions against private parties under the ATS, when the underlying conduct is that of a foreign sovereign on its own soil, has the effect opposite from what the statute's framers intended. Experience with such actions over the last two decades has shown that rather than mitigating international friction, these suits have (as discussed) chafed relations with U.S. allies and trading partners. Extending the ATS to actions like this one

thus "creates rather than avoids conflicts with foreign nations and thus runs directly counter to ... the ATS's design and purpose." *Exxon Mobil*, 654 F.3d at 72 (Kavanaugh, J., dissenting).

## II. AT THE VERY LEAST, THIS COURT SHOULD NOT RELY ON "UNIVERSAL JURISDICTION" TO CREATE A FEDERAL COMMON LAW CAUSE OF ACTION COMPLETELY LACKING ANY U.S. NEXUS

For the reasons explained earlier, it would be extraordinary for U.S. courts to create a common law cause of action implicating the conduct of foreign sovereigns on their own soil. But plaintiffs in this case seek much more than that—they ask this Court not only to create federal common law, but to extend it abroad to a conflict with no relevant connection to the United States. *See* U.S. Supp. Amicus Br. 13 (this case has no "connection to the United States beyond the residence of the named plaintiffs in this putative class action and the corporate defendants' presence for jurisdictional purposes").

The doctrine of "universal jurisdiction" is the asserted basis on which a sovereign may apply its law (normally criminal law) to conduct with no connection to that sovereign. The doctrine is generally recognized, in the abstract, for a limited set of *criminal acts*, but the decision whether to exercise such jurisdiction is always fraught with foreign policy risks, because it necessarily entails interference with other sovereigns' prerogatives. Here, plaintiffs seek the exercise of universal *civil* jurisdiction, which is a contested concept in itself, because it creates the same foreign policy risks as its criminal counterpart,

but without the critical constraint of prosecutorial discretion. An exercise of universal civil jurisdiction of the sort plaintiffs seek would be extraordinary even if imposed by Congress. If imposed by this Court, in the exercise of its common lawmaking authority, it would be a manifest affront to the separation of powers.

### A. This Action Can Be Justified Under International Law, If At All, Only As An Exercise Of "Universal Jurisdiction"

Normally, a nation is authorized under international law to apply its own law—i.e., to exercise prescriptive jurisdiction—to a dispute only when there is a connection between the proscribed conduct and the sovereign that purports to proscribe it. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-66 (2004); Restatement (Third) of Foreign Relations Law ("Restatement") § 402 (1987). Here, however, there is no relevant connection to the United States—the plaintiffs and defendants are aliens, and the conduct all occurred within the territory of a foreign government. *See Empagran*, 542 U.S. at 165 (while it is generally not "reasonable to apply [U.S.] laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim," principles of international law "provide Congress greater leeway when it seeks to control through legislation the actions of American companies" (citing Restatement §§ 402, 403)).[2]

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[2] For prescriptive jurisdiction purposes, "the nationality of a corporation or comparable juridical entity is that of the state

In the absence of any domestic nexus, international law contemplates the application of domestic law to foreign conduct only when the alleged conduct implicates "universal jurisdiction," *viz.*, "the principle that certain crimes are so heinous, and so universally recognized and abhorred, that a state is entitled or even obliged to undertake legal proceedings without regard to where the crime was committed or the nationality of the perpetrators or the victims." Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law 4 (Stephen Macedo ed. 2004); *see* Restatement § 404.[3]

Universal jurisdiction began as an effort by nations to combat piracy. *See* Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. Chi. Legal F. 323, 324 (2001). And while there is still some dispute about which modern offenses are sufficiently serious to justify its exercise, "most scholars seem to agree that it extends to the slave trade, genocide, war crimes, and torture." *Id.*; *see also Sosa*, 542 U.S. at 762 (Breyer, J., concurring) (the "subset [of crimes subject to universal jurisdiction] includes torture, genocide, crimes against humanity, and war crimes"); Restatement § 404.

Respondents here are alleged to have aided and abetted the Nigerian government's commission of

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under whose law it is organized." Restatement § 402 cmt. e; *see also id.* § 213.

[3] No one disputes that the federal common law cause of action recognized in ATS cases should not flout limits set by international law. *Cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.).

torture, extrajudicial execution, prolonged arbitrary detention, and crimes against humanity. Pet. Supp. Br. 4. Even assuming universal criminal jurisdiction is appropriate as to the primary perpetrator of all those crimes, plaintiffs here have not sued the primary perpetrator. They instead seek to hold respondents secondarily liable. And "[t]here does not appear to be any sustained general practice of universal jurisdiction for aiding and abetting offenses in national courts." Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 Harv. Int'l L.J. 271, 319 (2009). In fact, the prevailing "European view [is] that aiding and abetting is a lesser crime," and it thus follows that universal jurisdiction would be inappropriate for secondary liability even if appropriate to punish the primary conduct. *Id*; *see also Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgment, ¶¶ 181-82 & n.291 (Appeals Chamber, Feb. 25, 2004) (International Criminal Tribunal for the former Yugoslavia, explaining that "that aiding and abetting is a form of responsibility which generally warrants a lower sentence than is appropriate to responsibility as a co-perpetrator").

In any event, even if universal jurisdiction *could* be exercised in the circumstances of this case and those like it, that does not mean it *should* be exercised. *See* European Comm'n Amicus Br. 8-9 ("[A] State is not obligated to exercise jurisdiction to the full extent available under international law."). At the very least, that determination should be left to Congress and the executive, for the reasons described below.

### B. In The Criminal Context, The Decision Whether To Exercise Universal Jurisdiction Requires A Delicate Balance Of Policy Considerations, Including The Impact Of Such Exercise On Foreign Relations

While the concept of universal criminal jurisdiction is generally accepted for a limited set of crimes, the question whether to exercise it in any particular circumstance is highly controversial, in large part because of its interference with the prerogatives of foreign states. Thus, when Congress has been confronted with the option of applying U.S. criminal law to conduct without any connection to the United States, it has considered the matter carefully. In some cases Congress has rejected it outright. And in all cases, the Executive Branch performs robust oversight through the exercise of prosecutorial discretion.

1. Take, for example, the two law-of-nations offenses that remain at issue in the *Rio Tinto* case: genocide and war crimes. *See Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 744 (9th Cir. 2011) (en banc). Congress has expressly enacted criminal statutes to outlaw both offenses, but has either rejected or limited universal jurisdiction in each instance.

a. The War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104, implements the Geneva conventions by criminalizing certain violations of those conventions' terms (i.e., war crimes). The Act only applies, however, when there is a connection between the crime and the United States—i.e., when the victim or perpetrator of the crime is a member of the U.S. Armed Forces or a U.S. national. 18 U.S.C.

§ 2441(b). When Congress was considering the bill that would become the Act, the State and Defense Departments "recommended that [it] be amended to provide for universal jurisdiction." H.R. Rep. No. 104-698, at 7 (1996). Congress expressly rejected that recommendation, explaining that "[d]omestic prosecution based on universal jurisdiction could draw the United States into conflicts in which this country has no place and where our national interests are slight." *Id.* at 8. Congress also recognized that "problems involving witnesses and evidence would likely be daunting" and that "ample alternative venues" were available and "more appropriate." *Id.* at 8.

b. Congress has also criminalized genocide in the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988). As originally enacted, that Act did not provide for universal jurisdiction and limited its reach to offenses committed within the United States and to those committed by U.S. nationals. *Id.* § 2(a). After enactment of the Genocide Accountability Act of 2007, Pub. L. No. 110-151, 121 Stat. 1821, a U.S. nexus is no longer required, and prosecutions for genocide may proceed so long as the perpetrator is "present in the United States." 18 U.S.C. § 1091(e)(2)(D).

Nevertheless, the Genocide Act includes a separate provision that limits the potential foreign-relations harms associated with universal jurisdiction, explicitly stating that it creates no privately enforceable rights, thus assuring that only the United States, and not private plaintiffs, may bring an action for genocide. *Id.* § 1092 ("Nothing in this chapter shall ... be construed as creating any substantive

or procedural right enforceable by law by any party in any proceeding.").[4] Accordingly, even while allowing for universal jurisdiction, Congress sought to assure that only the Executive Branch—which is closely attuned to the foreign-policy difficulties of bringing such actions—would have the power to authorize such a prosecution.

2. The example of the Genocide Act highlights a broader point concerning universal criminal jurisdiction and its potential to create serious adverse foreign-policy consequences: even when *criminal* prosecutions without any U.S. nexus are allowed, such prosecutions will be initiated only if the Executive Branch decides the benefits of the prosecution outweigh the foreign-relations costs. It is no surprise, then, that while Congress has enacted several other universal jurisdiction provisions criminalizing human-rights abuses and terrorism—for example, recruitment of child soldiers (18 U.S.C. § 2442(c)(3)),

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[4] Before *Sosa*, the Second Circuit in *Kadic* held that "the legislative decision [in § 1092] not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act," and that "[n]othing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide." 70 F.3d at 242. That analysis was understandable on the view that the ATS itself creates a private remedy. After *Sosa*, however, that argument—which was accepted by the Ninth Circuit in *Rio Tinto*, 671 F.3d at 758-59 (relying on *Kadic* to hold that § 1092 does not preclude an action for genocide under the ATS)—makes no sense at all. *Sosa* explains that the ATS does not create a private remedy, and indeed, that any such remedy can only be created by the *courts* under common law. The legislative directive that the prohibition against genocide is not privately enforceable directly precludes such a court-created remedy.

hijacking (49 U.S.C. § 46502(b)), hostage-taking (18 U.S.C. § 1203(b)(1)(B)), and torture (18 U.S.C. § 2340A)—"[t]hese laws have only been used in a few cases, and perhaps never as the basis for a purely universal jurisdiction prosecution." Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 154 (2009).

Indeed, when Congress authorizes the executive's exercise of universal jurisdiction, it does so on the explicit understanding that the foreign-policy consequences of a prosecution for conduct with no connection to the United States will be considered at the highest levels before a prosecution is instituted. For example, in a recent statement to the United Nations concerning universal jurisdiction, the United States explained that "even if customary international law or a treaty regime recognizes the state's authority to assert jurisdiction over an offense, there are often prudential or other reasons why the United States refrains from exercising such jurisdiction." United States Submission Information and Observations on the Scope and Application of the Principle of Universal Jurisdiction at 3.[5] In pressing for universal jurisdiction in the War Crimes Act, the Executive Branch (under President Clinton) made clear that "in each case" based upon universal jurisdiction, "there should be careful judgment exercised at a high level within the Justice Department to ensure that each prosecution is warranted, taking into ac-

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[5] *Available at* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/United%20States.pdf. This statement was submitted to the U.N Sixth Committee in 2010. *See* http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml.

count the seriousness of the offense, the circumstances, the interests of the United States in a particular case, [and] the availability of alternatives such as extradition." *War Crimes Act of 1995: Hearings on H.R. 2587 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong., 2d Sess. 10-11 (1996). And the U.S. Attorneys' Manual specifies that "[p]rior, express approval of the Assistant Attorney General (AAG) of the Criminal Division (or his or her designee) is required for [a variety of] court actions involving a torture, war crimes, or genocide matter." U.S. Attorneys' Manual 9-2.139(E) (2007) (emphasis omitted).

The principle that foreign-policy consequences be considered when contemplating foreign human-right prosecutions based on universal jurisdiction is so important, in fact, that Congress recently codified it in U.S. positive law. In the Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, 123 Stat. 3480, Congress directed the Attorney General to "establish a section within the Criminal Division of the Department of Justice with responsibility for the enforcement of laws against suspected participants in serious human rights offenses," 28 U.S.C. § 509B(a), including "violations of Federal criminal laws relating to genocide, torture, war crimes, and the use or recruitment of child soldiers," *id.* § 509B(e). Congress specifically directed that, in carrying out the new section's responsibilities, the "Attorney General shall, as appropriate, consult with the Secretary of Homeland Security and the Secretary of State." *Id.* § 509B(c). And "[i]n determining the appropriate legal action to take against individuals who are suspected of committing serious human rights offenses

under Federal law, the section shall take into consideration the availability of criminal prosecution under the laws of the United States for such offenses or in a foreign jurisdiction that is prepared to undertake a prosecution for the conduct that forms the basis for such offenses." *Id.* § 509B(d).

In sum, Congress and the Executive Branch have both recognized that the decision whether to enact or enforce universal criminal jurisdiction statutes is a highly complex and difficult policy judgment, and that the involvement of high-level political officials tasked with consideration of the foreign-policy consequences of universal jurisdiction prosecutions is a crucial check that mitigates the foreign-relations risks of recognizing universal jurisdiction in the first place.

### C. Universal Civil Jurisdiction Lacks The Important Checks Of Its Criminal Counterpart, As Foreign Experience Shows

1. Universal criminal jurisdiction is widely accepted at least in theory, but universal civil jurisdiction is not. As the European Commission observes, the "exercise of universal *civil* jurisdiction is less established in international law than its criminal counterpart." European Comm'n Amicus Br. 17; *see Sarei v. Rio Tinto, PLC*, 550 F.3d 822, 831 (9th Cir. 2008) (en banc) (plurality opinion) ("[T]he basis for exercising universal civil jurisdiction, such as under the ATS, is not as well-settled as the basis for universal criminal jurisdiction"); *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 41 I.L.M. 536 (2002) (Joint Separate Opinion of Judges Higgins,

Kooijmans, and Buergenthal at ¶ 48) (universal civil jurisdiction exercised by U.S. courts under the ATS has "not attracted the approbation of States generally"); International Bar Ass'n, *Report of the Task Force on Extraterritorial Jurisdiction* 128 (Feb. 6, 2009) ("Universal civil jurisdiction remains a controversial topic within the area of extraterritorial tort jurisdiction.").

There is a good reason for the distinction. As explained, a nation's assertion of universal jurisdiction over conduct in other countries is normally checked by the prosecutorial authority inherent in criminal actions. But if a cause of action is recognized here, "the jurisdiction of the courts would be invoked by private plaintiffs without 'the check imposed by prosecutorial discretion,' *Sosa*, 542 U.S. at 727, that the Executive can exercise in the criminal context." U.S. Supp. Amicus Br. 17. "Whereas the government is responsible in the criminal context for considering the foreign policy costs of exercising universal jurisdiction, private plaintiffs in civil cases have no such responsibility and, in any event, are unlikely to have the incentive or expertise to do so." Bradley, *supra*, at 347. "Nor is there public accountability for such foreign policy decisions in the way that there is in the prosecutorial context." *Id.*

2. Although the European Commission in *Sosa* filed a brief questioning the basis for universal civil jurisdiction, *see* Br. of Amicus Curiae the European Comm'n at 14-22, *Sosa v. Alvarez-Machain*, No. 03-339 (U.S.) (Jan. 23, 2004), the Commission now argues that universal civil jurisdiction is gaining traction, in large part due to laws in many European countries "that currently permit victims of crime to

seek monetary compensation in *actions civiles* within criminal proceedings based on universal jurisdiction." European Comm'n Br. 18. Justice Breyer similarly argued in *Sosa* that agreement over universal criminal jurisdiction extends to civil jurisdiction because "criminal courts of many nations combine civil and criminal proceedings, allowing those injured by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself." 542 U.S. at 762-63 (Breyer, J., concurring).

Those contentions miss a crucial distinction: in nearly all the European countries that allow individuals to institute quasi-criminal actions and/or to recover monetary damages ancillary to criminal prosecutions, the action *cannot proceed without prosecutorial authorization*. *See* Human Rights Watch, Universal Jurisdiction in Europe: The State of the Art 30-32 (June 2006).[6] The civil actions thus are generally subject to the same check that constrains criminal actions.

3. The importance of prosecutorial oversight is illustrated by the experience of Belgium and Spain, nations that until recently did *not* implement such a prosecutorial screen on private quasi-criminal actions. That experiment was as short-lived as it was ill-advised.

Belgium enacted a universal criminal jurisdiction statute in 1993, and expanded it in 1999 to include genocide, crimes against humanity, and war crimes. Monica Hans, *Providing for Uniformity in the Exer-*

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[6] *Available at* http://www.hrw.org/sites/default/files/reports/ij0606web.pdf.

*cise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish this Goal?*, 15 Transnat'l Law. 357, 369-70 (2002). While that statute was facially criminal, it in effect operated as a civil provision as well, because Belgian law permits criminal investigations to be instituted by individuals and joined by private claims for compensation. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 Mich. J. Int'l L. 927, 932 (2008). Thus, under Belgium's universal jurisdiction provision, foreign alleged victims could "institute a criminal investigation" of crimes occurring abroad, and thereby "bypass prosecutorial discretion." Zachary Mills, Comment, *Does the World Need Knights Errant to Combat Enemies of All Mankind? Universal Jurisdiction, Connecting Links, and Civil Liability*, 66 Wash. & Lee L. Rev. 1315, 1331 (2009) (internal citations omitted).

Spain's law was similar. It "permitt[ed] the prosecution of foreign defendants for genocide, terrorism, and other crimes under international law, regardless of where they were committed." *Id.* at 1334. And such actions could be instituted by groups or individuals, "even over the objections of the prosecutor." *Id.*

Perhaps not surprisingly, the unlimited universal jurisdiction provisions in both countries led to abuse, and eventually to serious international friction. In Belgium, for example, private prosecutions were initiated by Palestinians against Ariel Sharon, by Israelis against Yassir Arafat, and by others against (to name just a few) Fidel Castro, Saddam Hussein, Hashemi Rafsanji, George H.W. Bush, and Colin

Powell. *Id.* at 1332-33. Spain experienced similar results under its statute, with prosecutions being initiated by foreigners against foreign officials with no connection to Spain. *Id.* at 1334-38.

These unfiltered universal jurisdiction claims caused "political friction [with] serious domestic and international consequences." Karinne Coombes, *Universal Jurisdiction: A Means to End Impunity or a Threat to Friendly International Relations?*, 43 Geo. Wash. Int'l L. Rev. 419, 454 (2011) (quotation omitted). In Belgium, for example, the United States voiced its strong opposition to universal jurisdiction actions against its officials, and threatened to move NATO headquarters out of Brussels. Mills, *supra*, at 1332 & n.124. But absent the constraint of prosecutorial discretion, these nations had no way to rationally resolve "the tension between the pleas of victims for justice and the worries of governmental officials about the monetary and diplomatic price of trials." Stephen R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 Am. J. Int'l L. 888, 892 (2003).

Again, perhaps not surprisingly, Belgium and Spain ultimately amended their universal jurisdiction statutes so as to greatly restrict the use of universal jurisdiction by private parties. Belgian lawmakers "curtail[ed] the exercise of universal jurisdiction by barring civil petitioners from filing complaints where there was no link to Belgium on one hand, and by allowing the executive branch to override the exercise of jurisdiction by the Belgian courts under certain conditions, on the other." Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. Int'l Crim. Just. 400, 402 (2005). Simi-

larly, Spain limited its "universal jurisdiction" statute so that it was no longer a genuine universal jurisdiction statute, allowing jurisdiction only in cases where "(i) the victims are Spanish, (ii) the alleged perpetrators are in Spain, or (iii) some other clear link to Spain can be demonstrated." Steve Kingstone, *Spain Reins in Crusading Judges*, BBC NEWS, June 25, 2009.[7]

Thus, far from ratifying the type of universal civil jurisdiction plaintiffs seek to press under the ATS, the European experience highlights the pitfalls of such an approach. That experience demonstrates with particular clarity why the decision whether to exercise universal jurisdiction must be left to government officials with competence to weigh the costs (including serious foreign-relations costs) and benefits of such actions.

### D. Congress' Invocation Of Universal Civil Jurisdiction In The TVPA Shows Why This Court Should *Not* Invoke Universal Civil Jurisdiction Here

The distinction between universal criminal and civil jurisdiction has not been lost on Congress. While Congress has enacted several universal criminal jurisdiction provisions, *supra* at 25-26, it has enacted only one providing for civil actions: the TVPA, 28 U.S.C. § 1350 note, which allows civil suits for torture and extrajudicial killing committed abroad, brought either by U.S. citizens or aliens, against in-

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[7] *Available at* http://news.bbc.co.uk/2/hi/europe/8119920.stm.

dividuals acting under color of the law of a foreign nation.

While petitioners view the existence of the TVPA as evidence that Congress has ratified the type of civil claims they seek to bring here, Pet. Supp. Br. 14-15 & n.5, the sharp limits Congress has placed on TVPA claims in fact demonstrates the precise opposite. In particular, Congress precluded TVPA suits against corporations, limiting the statute's reach to individuals. *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012). Congress also required exhaustion of local remedies before suit could be brought in federal court. 28 U.S.C. § 1350 note, § 2(b). And Congress did not expressly provide for aiding-and-abetting liability, thus precluding the recognition of such liability. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 175-77 (1994).

Petitioners' action thus fails every precondition Congress imposed on TVPA actions: they have sued a private corporation, on an aiding-and-abetting theory, without exhausting local remedies. Congress's enactment of the TVPA thus demonstrates exactly why this Court should *not* recognize the claim petitioners seek to press. The TVPA at most demonstrates that Congress has ratified the relatively noncontroversial *Filartiga*-type suits at issue in the "first wave" of modern ATS litigation. The TVPA proves the opposite for paradigmatic "second wave" suits like this one—i.e., secondary liability actions against private defendants implicating the conduct of a foreign sovereign—that have been the cause of so much international friction. *See supra* Part I.C; *see also* U.S. Supp. Amicus Br. 21.

For the reasons discussed, the policy judgment whether to recognize universal civil jurisdiction beyond the current constraints of the TVPA is a difficult and complex one. But make no mistake—it is a *policy* judgment. And the question whether *courts* should make such a judgment is not a difficult one at all. As *Sosa* recognizes, "exercising jurisdiction with such obvious potential to affect foreign relations" (542 U.S. at 731) is a decision for Congress, not this Court.

## CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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